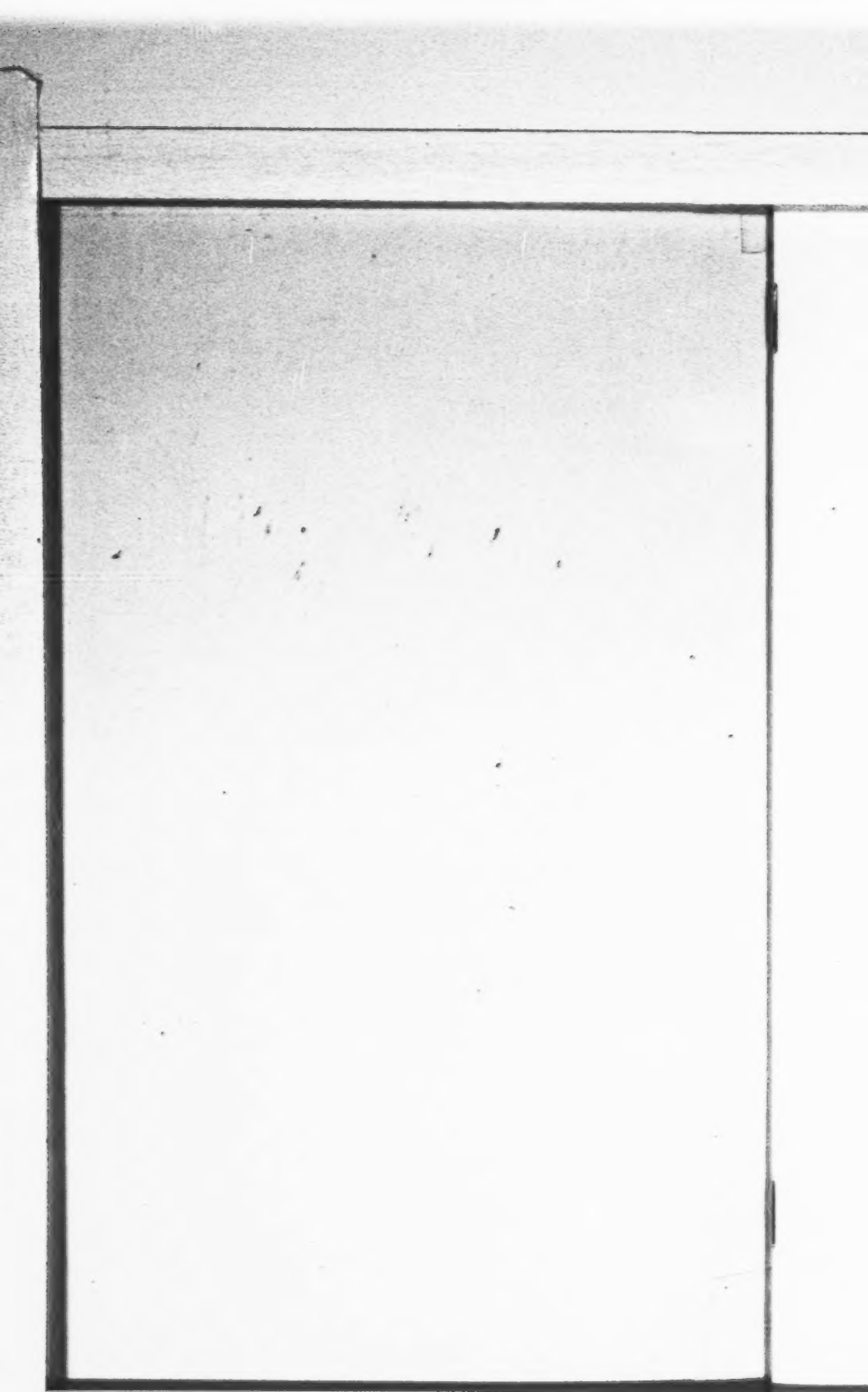

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-397

BRAND PLASTICS COMPANY, STANDARD OIL COMPANY (INDIANA), and AMOCO CHEMICALS CORPORATION,
Petitioners,
vs.
THE DOW CHEMICAL COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

A. Summary Statement

The petition should be denied. This is a routine patent case based upon a patent which is now expired. It presents no question of public importance or unusual question of law. There is no conflict in the decisions of the several Courts of Appeal with respect to the only issue raised by this case.

Petitioner's questions are contrived and are not actually present in this case. This court has previously dealt with the duty of a patent applicant to disclose to the Patent Office all facts concerning possible fraud or inequitableness and the various courts of appeal have followed the pronouncements of this court.

If the facts of this case present any question, it is:

Did the evidence concerning the patentees' negotiations with the Patent Office and the procurement of the patent in suit prove that anything of significance was concealed from the Patent Office or that patentees' conduct was other than essentially fair?

While the Court of Appeals answered this question in the negative, it, being evidentiary, raises no issue cognizable by this court.

B. Summary of the Proceedings

In this case the District Court held the patent invalid in oral opinion at the conclusion of the patentees' prima facie case. Later, the question of attorney fees was raised by motion and decided by the District Court without a trial on the issue raised in that motion. The Court of Appeals affirmed the ruling of the District Court holding the patent invalid. However, on the attorney fees issue the Court of Appeals gave consideration to evidence bearing on the relative pertinence of the allegedly withheld prior art and on the nature of the patented process which the District Court refused to receive in evidence and did not consider before awarding attorney fees. That evidence was the proffered testimony of Patent Examiner Sheffer, before the Court of Appeals as an offer of proof under Rule 43(c) F.R. Civ. P., Appendix 1, p. b1-b11, which contradicted the findings of the District Court that the allegedly withheld prior art was more pertinent than that considered by the Patent Office and that the Patent Office was misled by the patentee as to the nature of the patented process. The Court of Appeals reversed on the dual grounds that there were no findings of the requisite pre-

cision to make the case exceptional under 35 U.S.C., Sec. 285, and " . . . that even had such findings been made, they would have lacked sufficient evidentiary foundation." (Appendix A, p. a2).*

The Court of Appeals received extensive briefs and heard argument by petitioner and respondent with respect to the District Court findings relating to the alleged fraudulent procurement of the patent in suit which are again set forth in the petitioner's brief, pages 6-11. The Court of Appeals made its own appraisal of the evidence underlying those findings and the testimony of Patent Examiner Sheffer which was not considered by the District Court. The Court of Appeals in its opinion properly concluded:

> "We have carefully examined the record, particularly that concerned with the appellant's negotiations with the patent office and its procurement of the patent in suit. We are left with the definite conviction that there was no palpable fraud committeed by the appellant in respect to these negotiations and that, on the whole, the conduct of it and its attorneys was essentially fair. Nothing of significance was concealed from the patent office. . . .". (Appendix A, p. a2).

C. Argument

This case raises no new question of federal law: it includes no decision that conflicts with the applicable decisions of this court; and the decision of the Ninth Circuit Court of Appeals is not in conflict with the decision of any other Court of Appeals on the same matter. Moreover, there is no need for this court to restate an applicant's duty to the Patent Office.

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* Citations in the form "(Appendix A ....)" are to pages of the Appendix bound to the petition.

The standard of conduct to which an applicant for patent must conform has been clearly stated by this Court, as follows:

> ". . . Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all facts concerning possible fraud or inequitableness underlying the applications in issue . . ." *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.* (1945), 324 U.S. 806, 818, 89 L.Ed. 1381, 1388.

The Ninth Circuit Court of Appeals is aware of and has applied the "uncompromising duty" test in attorney fees cases, and depending upon the facts has granted or refused to grant awards. Attorney fees were awarded in *Monolith Portland Midwest Co. v. Kaiser Aluminum and Chemical Corp.*, 407 F. 2d 288 (9 Cir. 1969). The Ninth Circuit followed this Court's standard stated in *Precision* and announced a stringent application of that rule in determining whether the case was exceptional within the meaning of 35 U.S.C., Sec. 285, as follows:

> ". . . An applicant's fraud on the Patent Office is enough standing alone to convert his later infringement action into an exceptional case within the meaning of section 285. *But conduct short of fraud and in excess of simple negligence is also an adequate foundation for deciding that a patent action is exceptional.*" (Our italics). (407 F. 2d 294).

The statute involved, 35 U.S.C., Sec. 285, Petitioner's Brief, p. 3, gives to the court the discretionary power to award attorney fees in exceptional cases. That statute was restated more restrictively in the 1952 revision of the

patent laws. The clause "in exceptional cases" was then introduced. It was not in the earlier version of the statute; see 35 U.S.C., Sec. 70 in the 1946 and prior editions of the United States Code. Indeed, the revisors of Title 35 noted that "'in exceptional cases' has been added as expressing the intention of the present statute as shown by its legislative history and as interpreted by the courts." The statute is discretionary on its face in that the court *may* award attorney fees. (Our italics). In the *Monolith* decision the court appropriately applied the revisors' intention and the permissive nature of the statute in its analysis which led to the granting of attorney's fees for patentee actions less than actual fraud as follows:

> "Each of the above four challenged findings is supported by the record. Taken together, they evidence a course of conduct by Monolith which, if not properly characterized as actually fraudulent, reveals a calculated recklessness about the truth and which constitutes a serious breach of duty to the Patent Office. The findings adequately support the District Court's conclusion that the patent side of the case was exceptional." (407 F. 2d 297).

In a later decision, *Alburger v. Magnaflux Corp.*, 444 F. 2d 1406 (9 Cir. 1971), the Ninth Circuit Court of Appeals reversed the District Court award of attorney fees. In so doing, the Court of Appeals distinguished the *Monolith* case, *supra*, noting that the "issue of fraud on the Patent Office was not tried and was raised only after trial on appellee's petition for attorney fees." (444 F. 2d 1407), and further that patentee's good faith actions precluded such award.

The *Monolith* and *Alburger* decisions demonstrate that the Ninth Circuit Court of Appeals applies the rule of the *Precision* case in determining whether the facts make the case "exceptional" within the meaning of that term as used in 35 U.S.C., Sec. 285. In the present case the Court of Appeals found the facts to be insufficient.

There is no conflict between the several Courts of Appeals as to the " . . . uncompromising duty . . . " rule of the *Precision Instrument* case. That rule has been relied upon and applied by a determination of whether the rule was followed in good faith by the applicant. Where, as here, the Court found good faith actions by the applicant, attorney fees were denied. Representative decisions appear in the margin (*1) below.

Petitioner's allegation that the instant case is in direct conflict with the *Strassheim* decision in the Seventh Circuit, Petitioner's Brief, p. 17, is untrue. Lack of diligence by the patentee in prosecuting that case in the District Court and the failure to make discovery at the appropriate times weighed heavily in the Court's decision to award attorney fees, 477 F. 2d 824, Fn. #9. The *Strassheim* case is philosophically consistent with the rule in the Ninth Circuit Court of Appeals that "conduct short of fraud and in excess of simple negligence is also an adequate foundation for deciding that a patent action is exceptional." *Monolith Portland Midwest Co. v. Kaiser Aluminum Corporation,* 407 F. 2d 294.

(*1)

C.A. 2: Indiana General Corp. v. Krystinel Corporation, 421 F. 2d 1023, 1033-1034 (1970), certiorari denied, 398 U.S. 928.

C.A. 3: Corning Glass Works v. Anchor Hocking Glass Corp., 374 F. 2d 473 (1967); 253 F. Supp. 461, 470 (D.C. Del. 1966).

C.A. 4: Triumph Hosiery Mills., Inc. v. Alamance Industries, Inc., 299 F. 2d 793 (1962); 191 F. Supp. 652, 657 (D.C. M.D. N.C. 1966).

C.A. 5: Beckman Instruments, Inc. v. Chemtronics, Inc., 428 F. 2d 555, 565 (1970); certiorari denied, 400 U.S. 956, rehearing denied, 400 U.S. 1025.

C.A. 6: Chas. Pfizer Co. F.T.C., 401 F.2d 574, 579 (1968), certiorari denied, 394 U.S. 920.

C.A. 7: Mercantile National Bank of Chicago v. Quest, Inc., 431 F. 2d 261, 266 (1970), certiorari denied, 401 U.S. 956.

C.A. 8: Acme Precision Products, Inc. v. American Alloys Corp., 422 F. 2d 1395, 1400 (1970).

C.A. 10: Natta v. Hogan, 392 F. 2d 686, 693 (1968).

The patent in suit has expired and the outcome of the attorney fees issue is of no importance to the public but only to the parties, *Rice v. Sioux City Cemetery*, (1955), 349 U.S. 70, 74.

CONCLUSION:

For the above reasons, this case presents no issue of vital public concern. No conflict exists between the several circuits of the only issue raised by the facts of this case. The petition should be denied.

Respectfully submitted,
NEAL A. WALDROP,
Counsel for Respondent

Dated: September 27, 1973.

Of Counsel:

Wm. Howard Nicholas
NICHOLAS, KOLLINER, MYERS
D'ANGELO & GIVENS
Sidney J. Walker
William M. Yates

APPENDIX 1

TRANSCRIPT OF TESTIMONY

(3255) The Court: File it as an exhibit and designate it as part of the record on appeal. What's the matter with that?

Mr. Waldrop: If the record may show clearly that it was offered as an offer of proof.

The Court: Yes. It is offered, and based upon the summary made by Mr. Waldrop, it is rejected.

Mr. Nicholas: The offer of proof is rejected, and this is the proof—

The Court: And the proof will be the exhibit next in order of Dow, that is, the offer of proof.

All right. Anything further?

Mr. Nicholas: That Mr. Abner Sheffer, if called as a witness and permitted to testify, would testify in accordance with this offer of proof, and also I would like to file with that exhibit the qualification page of Mr. Abner Sheffer showing his education and his service with the Patent Office.

The Court: Let that be marked as Exhibit 683 and Exhibit 684.

(The exhibits referred to were marked Dow's Exhibit 683 and 684 and received in evidence.)

The Court: Anything further, gentlemen,

Mr. Nicholas: Do you want to go through these last, 85 on of the findings?

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Brand Plastics Company, Standard Oil Company (Indiana) and Amoco Chemicals Corporation, *Plaintiffs*, v. The Dow Chemical Company, *Defendant.*	Civil Action No. 65-1725-WPG
The Dow Chemical Company, *Plaintiff*, v. Dart Industries, Inc., *Defendant.*	Civil Action No. 66-412-WPG

AFFIDAVIT OF ABNER SHEFFER (Dow Exhibit 684)

State of California
County of Los Angeles—ss.

Abner Sheffer, after being duly sworn, deposes and says that:

1. He received a degree of Bachelor of Chemical Engineering in 1937 and the degree of Bachelor of Laws in 1948.

2. He became employed as a patent examiner in the United States Patent Office in 1937 and continued there until 1952.

3. In 1937-38 he worked in Division 20 and after 1938 was continuously employed in Division 50 until he left the Patent Office in 1952.

4. During his 1937-1952 employment, the Patent Office was organized in divisions, approximating 70 in number in 1951. Each division was assigned the responsibility for examining patent applications in a certain area of technology, for example, Division 50, between 1938 and 1952 had the responsibility for the examination of inventions in synthetic resins, including synthetic rubber, and for part of the time, rubber, carbohydrates and coating processes. Each division was headed by a Primary Examiner who was assisted by a number of Examiners, each of whom was technically trained in the technology which was the responsibility of the Division. While the relationship of a Primary Examiner to his assistant examiners varied somewhat, the Primary Examiner was responsible for the final actions that were taken by his assistants in rejecting or allowing patent applications. After an assistant examiner had worked in a division for a reasonable length of time and became skilled in Patent Office procedures and the particular art being handled by the Division, he graduated to an intermediate status in which he was entitled to make decisions on patentability with the degree of supervision by the Primary Examiner of such an assistant being a function of the particular procedure of the specific Primary Examiner.

5. In 1938, Mr. Blake was the Primary Examiner and from about March 1940 until he left in 1952, Mr. Samuel Levin was the Primary Examiner of Division 50.

6. Mr. Levin trained the Examiners in his Division very carefully. For a period of about three or four years at the start of each Examiner's tenure he was required to report in detail on all actions that he proposed to take. Mr. Levin had been involved in examining patents in the field of synthetic resins (including synthetic rubber) for

a great many years and had a very good memory and knowledge of that art. He encouraged his examiners to make themselves familiar not only with the specific subject matter to which they were assigned but also with the general principles of polymer technology, and he had a practice of rotating assignments in the various arts in the Division so that each examiner would become as familiar as possible with many different aspects of polymer technology. He encouraged the examiners to read the technical journals and to have copies of relevant technical articles placed in the search files. He also encouraged the examiners to read the books on polymer science and Division 50 had an excellent library of recent publications and books, including texts and such reports of industrial information as German Plastics Practice and the published reports resulting from the work of U. S. and British teams of experts immediately after World War II, relating to German polymer technology. In addition, the examiners were encouraged to seek information from each other freely in the course of examining any particular application, and there was an extremely cooperative attitude among the various examiners in Division 50 during his entire employment.

7. He examined applications in all of the types of subject matter for which Division 50 was responsible, including synthetic resins, rubber, carbohydrates and coating processes, and for at least five years prior to 1950 he was in charge of examining applications relating to combinations of synthetic resins, and combinations of synthetic resins with rubber.

8. By 1950 he had long been familiar with the procedural rules of conduct for examiners to follow and after about 1940 he was personally knowledgeable of the main procedures which were first formally set down in about 1949 in the Manual of Patent Examining Procedures.

9. By 1950 he was sufficiently familiar with Patent Office procedures and the Rules of Practice by the Patent Office which set forth procedures to be followed by attorneys and applicants, to be called upon to assist the solicitor of the Patent Office in the preparation of the examination given to persons seeking to be registered to practice before the Patent Office.

10. He knows that during the 1938-1952 period there were no rules or published regulations issued by the Patent Office for the guidance of patent examiners, or applicants for patents or attorneys soliciting patents, which placed a requirement upon the applicant or his attorney to disclose to the Patent Office non-anticipating prior patents with which the applicant was familiar at the time of the application for patent was filed.

11. It was his experience that, aside from references that may have been mentioned in the body of the application to show the merits of the alleged advance in the art, applicants did not generally cite references to the Patent Office and as an Examiner he did not expect the applicant to call his attention to prior patents. Applicants would occasionally make a reference of record and in many of those instances Examiners were skeptical about the purpose for which the applicant would be making a reference of record.

12. When a reference was called to his attention, he would appraise the reference for pertinence to the claimed invention and where he thought that it was pertinent he would reject the applicant on the reference and leave it to the applicant to distinguish the claims from its teaching and in those cases in which he did not consider the reference to be pertinent he would not formally rely upon the cited reference to reject the claims.

13. When assigned an application for examination by Mr. Levin he would first look over the application and particularly the claims and prepare an abstract of the disclosure together with an indication of the class and sub-classes where the abstract should be kept. After typing as a file card, the abstract was filed for use by the Examiner in Division 50. After arriving at an understanding of the disclosure and after a thorough study of the claims, he would make a search.

He would refer to the classification manual to locate the art most relevant to the invention being claimed. By 1950, he was familiar with the classifications of subject matter handled in Division 50 and knew the most relevant sub-classes which contained art that was pertinent to mixed synthetic resins, or processes of making them. Usually, in the course of the search he would consult with other Examiners in Division 50 (and in other Divisions when he thought it appropriate) to determine whether such other Examiners knew of or could locate, relevant prior art on the invention as a whole or on particular features of the invention that would relate to the sub-classes handled by such Examiners.

Divison 50 maintained its own set of classified references relating to synthetic resins and all of the prior art coming within a particular classification, or sub-class, was physically retained in file cabinet drawers called "shoes". These shoes were open top removable drawers about 3" deep and 10" x 18" in size. These shoes were maintained in the Division for all Examiners to use and a search was made by looking at the references contained in the shoes. He thoroughly searched the most relevant sub-classes and routinely made an entry in the application prosecution file record listing the particular sub-classes that he had

thoroughly considered. When he thought it appropriate, he would also look through books and publications in the Division 50 library and in the general scientific library maintained in the Patent Office and make exploratory searches in other sub-classes; he would not record these search efforts in the application prosecution file record, in view of the obvious difficulty of defining the precise scope of the exploratory search.

14. He recognizes the file history of the patent in suit, Brand Ex. 44, as a typical one generated during the prosecution of an application.

15. He has inspected Brand Ex. 44 and he has no independent recollection of this particular application.

16. He identifies the first two lines of entries which appear on the last page of Brand Ex. 44 in the box labeled *"Searched"* as entries which are in his handwriting.

17. The first line of that entry recites Class 260, sub. 4. The second line recites sub. 45.5 Bu, and the date of February '51 and his initials "Sh".

18. These entries are the notes which he made in February 1951 to identify the sub-classes which he had searched thoroughly in the initial examination of this application. Sub-class 4 he recalls covered combinations of natural rubber and synthetic resins prepared from a polymerized unsaturated compound, e.g., styrene. Sub-class 45.5 Bu was a sub-class which covered combinations of synthetic resins in which one of the synthetic resins was a polymer of a diolefin such as butadiene. Bu refers to butadiene. This was a special sub-class collection which he made.

19. Dow Ex. 676 is a Xerox copy of the Classification Bulletin of the Patent Office covering Class 260, Chemistry, Carbon Compounds. This class covers the subject matter which was examined for patentability in Division 50 and he notes that the particular sheets which make up Ex. 676 cover the definitions in Class 260 between the dates of October 1949 and February 1952 for at least some of the sub-classes of Class 260.

20. He has reviewed the file wrapper history of the patent in suit, Brand Ex. 44, at the request of counsel within the last month.

21. He notes that the content of pp. 34, 35 and 36 are his own work and he notes on p. 36 his initials on the left-hand corner of the page, opposite Samuel Levin's signature and from that entry he knows that he made the search and wrote the action set forth on those pages.

22. He has no independent recollection of the particular search indicated by the entries on pages 34, 35 and 36 at this time.

23. Based on his inspection of these pages which contain the record of what he did at the time, he knows the sub-classes of Class 260 which were searched thoroughly in preparing the rejection that is contained on the file wrapper, pp. 34, 35 and 36. He notes that in addition to Class 260, sub-class 4 and sub-class 45.5, Bu, that he cited Rogers patent 2,406,403 from Class 260, Sub-class 95. He now recalls that Sub-class 95 covered processes of making synthetic resins and as a result of the citation of Rogers, he knows that he considered sub-class 95 as pertinent to the invention being claimed.

24. He notes from his inspection of Brand Ex. 44 that the response to the rejection, Paper #2, which is dated August 20, 1951, was considered by Mr. David E. Pelham as appears in Paper #4 of p. 46 of Brand Ex. 44. At the time in 1952 when Mr. Pelham acted, Paper #4, he had been in Division 50 for about 10 years. He knows that Mr. Pelham was technically trained, had a degree in chemistry and was experienced in examining applications relating to vinyl polymerizations.

25. He, Abner Sheffer, did not personally pass on the question of patentability of the claims of the application Brand Ex. 44.

26. He has no independent recollection of Stober-Amos Patent 2,530,409.

27. He has no independent recollection of Allen U. S. Patent 2,496,653 at this time.

28. At the request of counsel, he has studied the disclosure of Stober-Amos U. S. 2,530,409.

29. At the request of counsel, he has studied the disclosure of Allen U. S. Patent 2,496,653.

30. He has considered the disclosure of Stober-Amos Patent 2,530,409 relative to the disclosure and teachings of the references relied upon by him on page 34 of the file wrapper Brand Ex. 44.

31. Based on his comparison of Stober-Arms Patent 2,530,409 and the content of the references which he relied on in rejecting the claims on page 34 of Brand Ex. 44, he is aware of no Patent Office rule, regulation or practice which placed an obligation on the applicants in Brand Ex. 44 to call to the attention of the Patent Office the Stober-Amos Patent 2,530,409.

32. He has considered the disclosure of Allen et al. Patent 2,496,653 relative to the disclosure and teachings of the references relied upon by him on page 34 of the file wrapper of Brand Ex. 44.

33. Based on his comparison of Allen U. S. Patent 2,496,653 and the content of the references which he relied on in rejecting the claims on page 34 of Brand Ex. 44, he is aware of no Patent Office rule, regulation or practice which placed an obligation on the applicants in Brand Ex. 44 to call to the attention of the Patent Office the Allen et al. Patent 2,496,653.

34. He was personally familiar with the publication, "German Plastics Practice", and knows that he referred to "German Plastics Practice" in a routine fashion in examining patent applications when he considered it appropriate to do so. He also knows that it was common for other examiners in Division 50 to refer to the same volume and that this book was considered to be a particularly useful source of information by the examiners in that it contained disclosures of commercial technology which ordinarily did not appear in patent applications.

35. As a result of his consideration of the disclosure of the application, Brand Ex. 44, he understood the problem there disclosed to be the formation of gel particles or aglomerates of cross-linked interpolymer molecules or chains which appear as imperfections or blemishes, etc., visible to the naked eye when the product is molded or extruded by usual injection or compression molding operations.

36. The reference of record in the file history of the Amos et al .patents, Brand Ex. 44, shows in his opinion that it was known; (a) to agitate vigorously in the early stages of the mass homopolymerization of styrene, this being disclosed in the Rogers patent 2,406,403, Brand Ex. 90; (b) that the mass polymerization of styrene containing 1 to 10% (or greater) of rubber dissolved therein gave a product having improved impact resistance (Ostromislensky) and improved pliability (Distillers British Patent 593,072, for instance, at page 1, lines 15 to 28); further disclosures of the polymerization of styrene containing small amounts of dissolved rubber are found in the patent to Morley et al. 2,576,134 and Morley 2,382,498 as well as in the specification of the Amos et al. patent 2,694,692; (c) that in the polymerization of styrene in the presence of dissolved rubber and in the presence of very small amounts (e.g., .05%) of divinylbenzene, one should agitate vigorously from the outset of the polymerization at 60 degree C., this being disclosed in Distillers British Patent 593,072 in which the product of this process is stated to be "of reduced solubility characteristics" being substantially insoluble but swelling in the presence of the solvent.

37. He finds in the reference relied upon by the Patent Office suggestions at least as meaningful with respect to the question of patentability of the claims of the Amos et al. patent in suit as any suggestions or teachings which he finds in Stober-Amos 2,530,409 or Allen 2,496,653, or German Plastics Practice.

/s/ Abner Sheffer

Subscribed and sworn to, before me,
this 31st day of August, 1970.
Evelyn M. Wilson,
Notary Public in and for said County
and State.